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COURT OF CRIMINAL APPEALS
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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
1/31/2020
DEANA WILLIAMSON, CLERK

CARLOS LOZANO **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-17-00251-CR**

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34th JUDICIAL DISTRICT

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TRIAL COURT: 384th Judicial District Court of El Paso County, Texas, Honorable Patrick Garcia, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Senior Judge Ann C. McClure (sitting by assignment), Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

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STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument in this case, as the issue presented herein involves a nuanced analysis of the law of deadly force self-defense. Oral argument will therefore be helpful in highlighting why and how deadly force self-defense was not applicable, and how the Court of Appeals erred by preliminarily holding that Appellant was entitled to an instruction on the use of deadly force in self-defense when no facts were presented of his subjective state of mind at the time of the shooting.

STATEMENT OF THE CASE

Carlos Lozano, Appellant, was indicted for murder. (CR1: 9).[1] A jury found Appellant guilty as charged in the indictment. (RR10: 81).[2] Appellant elected to have the court assess punishment and was sentenced to confinement for 25 years in the Texas Department of Criminal Justice Institutional Division. (CR2: 796-97; RR11: 19). Appellant timely filed a motion for new trial, (CR2: 801-4), and notice of appeal. (CR2: 811-12). The trial court certified Appellant's right to appeal. (Supp. CR: 9-10).

[1] Throughout this petition, references to the record will be made as follows: references to the clerk's record will be made as "CR" and volume and page number, references to the supplemental clerk's record will be made as "Supp. CR" and page number, references to the reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

[2] Prior to opening statements, the State abandoned paragraphs C and D of the indictment. (RR7: 14-15).

STATEMENT OF PROCEDURAL HISTORY

On October 31, 2019, in an unpublished opinion, the Eighth Court of Appeals reversed Appellant's conviction and remanded the case for a new trial. *See Lozano v. State*, No. 08-17-00251-CR, 2019 WL 5616975, at *13 (Tex.App.–El Paso Oct. 31, 2019, no pet. h.)(not designated for publication). The State timely filed a motion for rehearing on November 15, 2019. On December 11, 2019, the Court of Appeals denied the State's motion for rehearing without opinion. The State timely filed a motion for extension of time to file a petition, which was granted by this Court. The State now timely files this petition for discretionary review pursuant to rule 68.2(a) and (c) of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 68.2(a), (c).

SOLE GROUND FOR REVIEW

The Eighth Court of Appeals erred in its preliminary holding that Appellant was entitled to jury instructions on the use of deadly force in self-defense because there was no evidence presented from any source of Appellant's subjective state of mind at the time of the shooting, that is, whether he was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, such that Appellant was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually submitted did not result in egregious harm because Appellant was not entitled to the instructions in the first place.

FACTUAL SUMMARY

In the early morning hours of September 26, 2015, in the parking lot outside of Pockets Billiards and Fun, a bar and pool hall located in El Paso, Texas, Jorge Hinojos punched Carlos Lozano, Appellant, as Appellant sat in his vehicle. (RR7: 46, 68, 98-100, 114, 132-33, 157, 166). In response, Appellant shot Hinojos three times, killing him. (RR7: 69, 102, 114, 133; RR8: 17-18).

Earlier that evening, Appellant went to Pockets Billiards to meet Fernanda Avila, who he was dating at the time. (RR7: 46; RR8: 83, 88). While there, Appellant, Avila, and a friend were drinking and having a great time. (RR8: 94). Around the time their friend left, another group of people joined them, and by this time, Avila and Appellant were "too drunk." (RR8: 95). One of the men in the group started talking to Avila, which upset Appellant, who became aggressive and told the man to "move." (RR8: 40-41, 47-48, 53, 55, 95-96). Appellant said "something about that if he [the man] didn't stop then there would be something like blood." (RR8: 49). Because the situation was getting tense, the man who was talking to Avila left. (RR8: 50).

On that same night, Jorge Hinojos, his girlfriend Diana Ruiz, and their friend Carolina Rocha also went to Pockets Billiards, arriving around midnight. (RR7: 60, 147-48). The Hinojos group ran into some acquaintances, including

David Torres, and the two groups joined up for the evening. (RR7: 61, 107-8, 149). Between 2:00 a.m. and 2:15 a.m., which was just past closing time, the combined group left Pockets Billiards. (RR7: 46, 62, 109, 149). As Rocha, who was texting on her phone, was walking to her car in the parking lot, she was almost hit by a fast-moving pickup truck driven by Appellant, but both were able to stop in time. (RR7: 65, 88-89, 111, 154-55). Rocha, who first noticed the truck by its headlights, was scared by the encounter but merely looked at the driver, whom she later identified at trial as Appellant, and did not say anything to him. (RR7: 155-56). Upon stopping, Appellant rolled down the driver's side window of the truck and stared at Rocha and her group in an ugly and/or intimidating manner. (RR7: 66, 68, 155, 173). Somebody from the group told Appellant "to watch out, like, to see what he was doing," and "what were you thinking? Be careful," but Appellant did not respond. (RR7: 66, 156-57). Appellant specifically stared at Ruiz, and at this point, Hinojos got upset because Ruiz was his girlfriend. (RR7: 113). Through the open, passenger-side window of Appellant's truck, Torres asked Appellant to leave because there were several of them and he did not want any problems. (RR7: 113, 130-31). As Torres was talking to Appellant, Hinojos threw a full can of beer at Appellant through the open, passenger-side window, and the beer spilled inside the truck. (RR7: 66-67, 96, 113-14, 130, 157).

Appellant then retrieved a gun from his backpack and pointed it through the open, passenger-side window at Torres, who again asked him to leave. (RR7: 114).

Meanwhile, Hinojos went around the truck to the driver-side window and punched Appellant, who was seated in the driver's seat of the truck, in either the face or shoulder with a closed fist at least once, and possibly two or three times, through the open window. (RR7: 68, 98-100, 114, 157). At all times, neither Hinojos nor anyone else from his group ever tried to enter Appellant's truck. (RR7: 77, 100, 132-33, 172). After the punch(es), Ruiz tried to get Hinojos to leave, and that is when Appellant shot Hinojos, who was unarmed, three times. (RR7: 69, 99, 102, 114, 158). Once Hinojos fell to the ground, Appellant sped away in his truck and fled to Mexico. (RR7: 69).[3] Ruiz helped put Hinojos in Rocha's car, and they took him to the nearest hospital, where he later died from his wounds. (RR7: 69-70, 102, 115, 158-59; RR8: 17-18). Appellant never said a word as the events unfolded, never gave a statement to the police,[4] and did not testify at trial. Nor did any witness describe Appellant's demeanor at the time he

[3] Appellant fled to Mexico immediately after the shooting. His crossing history showed that he crossed from the United States into Mexico at the Bridge of the Americas at 2:24 a.m. on September 26, 2015, which was only minutes after the shooting. (RR8: 178-80; SX 151-52).

[4] Appellant returned from Mexico to the United States and turned himself in to authorities on January 7, 2016. (RR9: 23-24).

pulled the trigger.

ARGUMENT AND AUTHORITIES

SOLE GROUND FOR REVIEW: The Eighth Court of Appeals erred in its preliminary holding that Appellant was entitled to jury instructions on the use of deadly force in self-defense because there was no evidence presented from any source of Appellant's subjective state of mind at the time of the shooting, that is, whether he was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, such that Appellant was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually submitted did not result in egregious harm because Appellant was not entitled to the instructions in the first place.

> **REASON FOR REVIEW:** The Eighth Court has decided an important issue of state law in a way that conflicts with an applicable decision of this Court. TEX. R. APP. P. 66.3(c); *see Werner v. State*, 711 S.W.2d 639, 645 (Tex.Crim.App. 1986); *Smith v. State*, 676 S.W.2d 584, 585 (Tex.Crim.App. 1984).

Despite there being no evidence from any source of Appellant's subjective state of mind, that is, whether he was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he pulled the trigger, the Eighth Court preliminarily held Appellant was entitled to jury instructions on the use of deadly force in self-defense and that errors in the self-defense instructions so submitted caused him egregious harm, thereby requiring reversal. *See Lozano*, 2019 WL 5616975, at *12-15, 30.

I. The law of self-defense

Self-defense is a justification for conduct that would otherwise be criminal. TEX. PENAL CODE §§ 9.02, 9.31, 9.32. "A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense." *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex.Crim.App. 2001). The record must contain some evidence, when viewed in the light most favorable to the defendant, that will support the claim. *See Ferrel*, 55 S.W.3d at 591. "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex.Crim.App. 2007). A defensive issue is "raised by the evidence" if there is sufficient evidence to permit a reasonable jury to find in the defendant's favor on the issue. *See Ferrel*, 55 S.W.3d at 592. A defendant need not testify for a defensive issue to be sufficiently raised. *See Smith v. State*, 676 S.W.2d 584, 585-87 (Tex.Crim.App. 1984). Defensive issues may be raised by the testimony of any witness, even one called by the State. *See Woodfox v. State*, 742 S.W.2d 408, 10 (Tex.Crim.App. 1987). But "if the evidence, viewed in the light most favorable to the defendant, does not establish self-defense, the

defendant is not entitled to an instruction on the issue." *Ferrel*, 55 S.W.3d at 591.

II. This Court has long held that the law of self-defense includes both subjective and objective components.

As applicable here, a person is justified in using deadly force in self-defense when and to the degree he reasonably believes deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force. TEX. PENAL CODE §§ 9.31(a), 9.32(a)(2). A "reasonable belief" is that which "would be held by an ordinary and prudent man in the same circumstances as the actor." TEX. PENAL CODE § 1.07(a)(42).

This Court has long held that the self-defense statutes (sections 9.31 and 9.32) include both subjective and objective standards, as "reasonable belief" is judged both from the actor's point of view and also from the ordinary prudent-person standard. *See Werner v. State*, 711 S.W.2d 639, 645 (Tex.Crim.App. 1986)("Although the test assumes that a defendant may act on appearances as viewed from his standpoint, the test also assumes the 'ordinary prudent man test of tort law (internal citations omitted).'"), *holding modified by Hamel v. State*, 916 S.W.2d 491, 493 (Tex.Crim.App. 1996)("*Werner* should not be interpreted to preclude a self-defense instruction where the defendant reasonably perceives that he is in danger, even though that perception may be incorrect."); *Dyson v. State*,

672 S.W.2d 460, 463 (Tex.Crim.App. 1984)("A person has a right to defend from apparent danger to the same extent as he would had the danger been real; provided he acted upon reasonable apprehension of danger as it appeared to him at the time."); *Semaire v. State*, 612 S.W.2d 528, 530 (Tex.Crim.App. 1980)("The term 'reasonably believes' encompasses the traditional holding that a suspect is justified in defending against danger as he reasonably apprehends it."); *Kolliner v. State*, 516 S.W.2d 671, 674 (Tex.Crim.App. 1974)(whether self-defense was justifiable is a question to be determined by the jury from the appellant's point of view at the time he acted). Thus, in order to justify the submission of a jury charge on the issue of self-defense, there must be some evidence in the record that shows both: (1) a defendant's subjective state of mind, that is, whether he had some apprehension or fear of being the recipient of the unlawful use of force from another, *see Smith*, 676 S.W.2d at 585; and (2) that the defendant's subjective apprehension or fear was objectively reasonable. *See Werner*, 711 S.W.2d at 645.

III. The Eighth Court's preliminary holding that Appellant was entitled to instructions on the use of deadly force in self-defense when there was no evidence of Appellant's subjective state of mind, that is, there was no evidence that he actually had some immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, conflicts with this Court's long-held precedent that under such circumstances, self-defense instructions are not warranted.

As discussed above, in order to be entitled to self-defense jury instructions at trial, there must be some evidence in the record of the defendant's subjective state of mind. *See Smith*, 676 S.W.2d at 585. In *Smith*, Smith's mother testified that Smith had told her that the complainant had been trying to hurt him, and Smith's fiancée testified that the complainant had pointed a gun at Smith and said that he was going to hurt him. *See Smith*, 676 S.W.2d at 586-87. This Court held that testimony by witnesses who testified as to statements made by Smith during the fight, although not strong nor convincing, raised the issue of self-defense, such that the trial court erred in refusing self-defense instructions. *See Smith*, 676 S.W.2d at 586-87.

The Courts of Appeals have followed the dictates of *Smith* and held that self-defense instructions are warranted when there is evidence of the defendant's subjective state of mind adduced at trial. *See, e.g., VanBrackle v. State*, 179 S.W.3d 708, 714 (Tex.App.–Austin 2005, no pet.)(where witnesses testified that the complainant pointed a gun at the appellant, who called for help and disarmed

the complainant, and where additional testimony indicated that the complainant was reaching into his pocket as if to pull out another object when he was shot by the appellant, who did not testify, the court held that the appellant's call for help was an observable manifestation of his belief that it was necessary to defend himself against the pointed gun and that shooting the complainant was some evidence of the believed necessity to protect himself, such that the issue of self-defense was properly raised).

Conversely, when there is no evidence in the record showing the defendant's subjective state of mind, the Courts of Appeals have held that the issue of self-defense is not raised, such that self-defense instructions are not warranted. *See, e.g., Reed v. State*, 703 S.W.2d 380, 384-85 (Tex.App.–Dallas 1986, pet. ref'd)(holding, where the evidence showed that when officers executed a "no-knock" search warrant at the appellant's home, an officer attempted to forcefully enter a bathroom with a closed door and that the appellant fired and wounded an officer as the officers entered, that no evidence was adduced as to the appellant's state of mind or observable manifestations of the appellant's state of mind, that is, there was no evidence the appellant acted upon a reasonable apprehension of danger as it appeared to him at the time of the shooting, such that he was not entitled to self-defense jury instructions); *Martinez v. State*, No.

02-18-00073-CR, 2019 WL 2134126, at *9 (Tex.App.–Fort Worth May 16, 2019, pet. ref'd)(mem.op., not designated for publication)(evidence did not show the appellant's subjective state of mind – that he was in immediate apprehension or fear that the decedent was about to kill or seriously injury him – after being slapped by the decedent, such that the trial court did not err by denying a deadly force self-defense jury instruction); *Vega v. State*, No. 05-16-00882-CR, 2017 WL 1245423, at *2 (Tex.App.–Dallas Apr. 5, 2017, no pet.)(mem.op., not designated for publication)(holding, where the evidence showed that the victim used force to flip a bed towards the appellant and that in response, the appellant punched, kicked, and grabbed the victim, but where no evidence was presented that the use of force against him placed the appellant in some immediate apprehension or fear, and the only evidence of the appellant's subjective state of mind was that he was angry, mad, and enraged, that the trial court did not err by refusing to give self-defense jury instructions); *Ivy v. State*, No. 07-15-00023-CR, 2016 WL 6092524, at *3 (Tex.App.–Amarillo Oct. 17, 2016, no pet.)(mem.op., not designated for publication)(holding, where the evidence showed that the victim pushed and slapped the appellant in an effort to get her phone back and that, in response, the appellant pushed the victim to the ground, stepped on her stomach and ribs, and struck her twice in the face, but where the evidence only showed the appellant's

state of mind [shaken up, angry, and upset] an hour after the incident and nothing showed any observable manifestation of the appellant's state of mind at the time of the incident, that even though the victim may have struck the appellant first, this provided no clue as to the appellant's subjective state of mind, such that the trial court did not err by denying a self-defense jury instruction); *Alexander v. State*, No. 03-14-00290-CR, 2016 WL 286385, at *4 (Tex.App.–Austin Jan. 21, 2016, pet. ref'd)(mem.op., not designated for publication)(holding that the evidence showing that the victim, who was angry and upset during the altercation, injured the appellant as they fought when she bit his arm, cut his lip, and punched him, without more, did not establish anything regarding the appellant's subjective state of mind during the fight, such that there was no evidence from which a reasonable fact finder could infer that the appellant was in apprehension or fear of the victim at any point during the fight or that the appellant had a reasonable belief that his use of force was immediately necessary to protect himself, such that the trial court did not err by denying a self-defense jury instruction); *James v. State*, No. 02-06-373-CR, 2007 WL 1649916, at *3-4 (Tex.App.–Fort Worth June 7, 2007, pet. ref'd)(mem.op., not designated for publication)(holding, where the evidence showed that after the victim pushed the appellant to get away from him, the appellant pushed, slapped, and hit her, but where the record contained no direct

evidence of the appellant's subjective state of mind nor evidence of an observable manifestation of his subjective state of mind at the time he used force against the victim, that the trial court did not err by denying a self-defense jury instruction).

Here, just as in the above cases finding no evidence in the record showing the defendant's subjective state of mind, even when responding to some level of provocation or force by a complainant, there also was no evidence from any source as to Appellant's subjective state of mind or observable manifestations of his subjective state of mind, that is, whether he had an immediate apprehension or fear that the complainant was about to kill or seriously injury him, at the time Appellant shot Hinojos. Although numerous eye-witnesses testified, all they testified to were the facts of the shooting itself. (RR7: 68-69, 98-100, 102, 114, 157-58). No one testified as to anything Appellant said at the time of the shooting or to Appellant's demeanor at the time of the shooting. In other words, there was no direct evidence or observable manifestations of Appellant's subjective state of mind at the time he pulled the trigger. In fact, similar to the *Vega* case cited above, the only observable manifestation of Appellant's subjective state of mind showed that he was aggressive, angry, and likely intoxicated hours before the shooting, (RR8: 40-41, 47-49, 53, 55, 95-96), and belligerent moments before the shooting. (RR7: 66, 68, 155, 173). No evidence showed that Appellant was in immediate

apprehension or fear that Hinojos (or anyone else, for that matter) was about to kill or seriously injury him at the time he shot Hinojos. Simply, absent any evidence of Appellant's actual, subjective state of mind, specifically, evidence that he was actually in fear of imminent death or serious bodily injury, no further inquiry into whether any such apprehension or fear was objectively reasonable is warranted – or even possible. As such, the Eighth Court erred when it did not consider the complete lack of evidence, from any source, of Appellant's subjective state of mind at the time of the shooting in concluding that Appellant was entitled to instructions on the use of deadly force in self-defense. *See Lozano*, 2019 WL 5616975, at *12-15, 30.

IV. Because Appellant was not entitled to deadly force self-defense instruction(s), he was not egregiously harmed by any error in the self-defense instructions actually given.

Because Appellant was not entitled to jury instructions on the use of deadly force in self-defense, he could not be harmed, much less egregiously harmed, by the self-defense jury instructions actually submitted, even if erroneously worded or defectively incorporated into the application paragraphs of the trial court's charge. *See Hughes v. State*, 897 S.W.2d 285, 301 (Tex.Crim.App. 1994)(where defendant was not entitled to a mitigating-evidence instruction, any error in the instruction given by the trial court was harmless because it could not have

contributed to the jury's answers to the special issues). For all of these reasons, Appellant was not egregiously harmed by the deadly force self-defense jury instructions, and the Eighth Court erred when it held otherwise.

PRAYER

WHEREFORE, the State prays that this petition for discretionary review be granted and that, upon hearing, this Court hold that Appellant was not egregiously harmed by the deadly force self-defense jury instructions and affirm his conviction.

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 14, contains 3,263 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Ronald Banerji
RONALD BANERJI

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on January 31, 2020, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to Appellant's attorney: Kenneth Del Valle, kendelvalle@aol.com.

(2) The undersigned also does hereby certify that on January 31, 2020, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ronald Banerji
RONALD BANERJI

APPENDIX

COURT OF APPEALS' OPINION

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CARLOS LOZANO,	§	
	§	No. 08-17-00251-CR
Appellant,	§	
	§	Appeal from the
v.	§	
	§	384TH District Court
THE STATE OF TEXAS,	§	
	§	of El Paso County, Texas
Appellee.	§	
		(TC#20160D00209)

O P I N I O N

A jury found Appellant Carlos Lozano guilty of one count of murder in the shooting death of Jorge Hinojos, and sentenced him to 25 years' in prison.[1] In two issues, Appellant, who claimed that he acted in self-defense as Hinojos was assaulting him at the time of the shooting, contends that the evidence was insufficient to support his conviction, and that the trial court committed egregious error when it instructed the jury that he had a general duty to retreat before he could justifiably use deadly force to protect himself against Hinojos's assault. Although we

[1] The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX.R.APP.P. 25.2(d). The certification is defective, and has not been corrected by Appellant's attorney, or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to TEX.R.APP.P. 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. Appellant's attorney is further ORDERED, to comply with all of the requirements of TEX.R.APP.P. 48.4.

find that the evidence was legally sufficient to support the jury's verdict, we agree with Appellant that the error jury charge resulted in egregious harm, and we therefore reverse the trial court's judgment and remand for a new trial.

BACKGROUND

Prior to the shooting, Appellant and Hinojos, who were not acquainted, arrived separately at a local billiard hall known as Pockets. Appellant arrived at Pockets on September 25, 2015, shortly before 8:30 p.m., and spent the evening with his date, Fernanda Avila, who had arrived earlier in the evening. Avila testified at trial that she and Appellant remained at the venue until closing time at approximately 2:00 a.m. the next morning, drinking beer throughout most of the evening.[2]

In the interim, Hinojos arrived at Pockets at approximately midnight, along with his girlfriend, Diana Ruiz, and their mutual friend Carolina Rocha. While there, they met up with three other male individuals, including David Torres, who testified at trial, and "Chrystyan" and "Carlos," neither of whom testified.

At closing time, Appellant and Avila left the venue first, and got into their separate vehicles. Avila recalled that as she drove away, Appellant remained behind in the parking lot in his truck. Shortly thereafter, Appellant and his friends left the venue as well, but remained in the parking lot, drinking beer that someone in their group had brought with them. At some point, Rocha went inside Pockets to use the restroom, and while she was walking back through the

[2] Avila testified that at approximately 11:00 pm, she told the bar manager not to serve her and Appellant any more drinks because she believed they were becoming "too drunk," and because Appellant had become "aggressive" and "upset" when two of his coworkers, who were also at the venue, began speaking with her. That situation, however, resolved itself when the two co-workers left the venue shortly thereafter, and it is unclear whether Appellant continued to drink after that time.

parking lot, texting on her phone, Appellant drove by her in his truck at a very fast rate of speed and came close to hitting her. Rocha testified that although she was initially "scared" or "intimidated" when the truck drove past her, she calmed down after the truck stopped, and she thereafter continued walking toward her car.

The Confrontation

After the truck stopped, Ruiz, Torres, and Rocha observed Appellant roll down his passenger side window and stare at Rocha. Although they described Appellant's stare as being "ugly" or intimidating, they all agreed that Appellant did not speak to anyone in the group, and in particular, did not make any verbal or other threats to anyone at that time. Although all witnesses agreed that Rocha was no longer in danger, some members of the group began yelling at Appellant for driving too closely to Rocha, and telling him that he needed to be more careful. Appellant, however, did not respond and instead continued staring at the group. As there were "several" people in their group, including four men who were standing near Appellant's truck at that time, Torres spoke to Appellant through the passenger side window and encouraged him to leave, as he did not want any "problems."

Ruiz and Torres both recalled that at this same time, Hinojos appeared to become "mad," "angry," and "aggressive," presumably because Appellant had turned his attention to stare at Ruiz, Hinojos's girlfriend. Hinojos thereafter threw a newly opened beer can through the open passenger side window of Appellant's truck, which "exploded" inside the truck. Although witnesses agreed that the beer can was thrown in Appellant's direction, it was unknown if the beer can actually hit Appellant.

Appellant thereafter lowered his driver side window, and Torres testified that he saw Appellant reach for his backpack from behind his seat and take out a gun; Torres further testified that Appellant pointed the gun at him through the passenger side window. Hinojos, however, apparently did not see the gun, and walked behind Appellant's truck toward the driver side. All of the witnesses agree that at this point, Hinojos either hit or attempted to hit Appellant with his fists through the open driver side window of Appellant's truck. Ruiz, who was closest to Hinojos and was trying to stop him, recalled that Hinojos hit Appellant once in the face with a closed fist through the open window. Torres, who was apparently still on the other side of the truck, saw Hinojos hit Appellant two or three times, either on Appellant's face or shoulder. Rocha, who earlier told police that she had seen Hinojos hit Appellant in the face, testified at trial that she saw Hinojos "throw a blow" with his hands at Appellant through the truck's window, but stated that she was uncertain whether Hinojos's hand made contact with Appellant.[3] At trial, Rocha also expressed her belief that it was unlikely Hinojos made contact with Appellant through the truck's window, as she described Hinojos as being "short" and Appellant's truck as sitting "very high" off the ground.[4]

It is undisputed that while Hinojos was hitting, or was attempting to hit, Appellant through the open window of his truck, Appellant shot Hinojos three times. Appellant left the scene immediately after the shooting, and Border Patrol records indicate that he crossed into Juarez at 2:24 a.m., approximately eleven minutes after the shooting. After calling 911 and reporting

[3] In her police statement, Rocha stated that she observed Hinojos punch or hit Appellant in the face through the truck's window. At trial, however, Rocha contended that her statement to police was inaccurate.

[4] The autopsy report stated that Hinojos was 70 inches tall and weighed 191 pounds at the time of his death.

Appellant's license plate number to the 911 operator, Hinojos's friends put him in Rocha's car and drove him to a nearby hospital where he passed away shortly thereafter.

The Medical Examiner's Findings

According to the medical examiner who performed the autopsy on Hinojos's body, Hinojos suffered three gunshot wounds, one to his chest when Hinojos was facing in the direction of the gun, and another through his left arm, neither of which were fatal.[5] However, a third gunshot wound that entered through the left side of Hinojos's upper back was fatal, as it punctured his lungs and caused a life-threatening aortic tear. The medical examiner testified that the fatal wound entered Hinojos's left side as he was facing away from the shooter, but he was unable to determine the distance from which the shot was fired. The medical examiner further testified that Hinojos tested positive for cocaine and had a blood-alcohol level of .035 at the time of his death.

Appellant's Claim of Self-Defense

Appellant was subsequently indicted on one count of murder in a two-part indictment, alleging that Appellant "intentionally and knowingly" caused Hinojos's death by shooting him, or, in the alternative, that Appellant, with the intent to cause serious bodily injury, "commit[ted] an act clearly dangerous to human life, to-wit: shooting Jorge Hinojos, caused his death." At trial, Appellant's sole defense was that he acted in self-defense when he shot Hinojos. The jury, however, rejected Appellant's claim of self-defense and found Appellant guilty of murder. This appeal followed.

DISCUSSION

[5] The medical examiner could not determine which direction Hinojos was facing when he was hit in the arm.

In his first issue, Appellant contends that there was legally insufficient evidence to support the jury's rejection of his self-defense claim, and in his second issue, he contends that the trial court committed egregious error when it instructed the jury that he had a general duty to retreat before he could justifiably use deadly force in response to Hinojos's assault. We take the issues in reverse order.

I. THE ERRONEOUS SELF-DEFENSE INSTRUCTION

The trial court is required to charge the jury on the law applicable to the case, including all elements of the offense charged, as well as all statutory defenses, affirmative defenses, and justifications when they are raised by the evidence and requested by the defendant. *See Walters v. State*, 247 S.W.3d 204, 208–09 (Tex.Crim.App. 2007), *citing* TEX.PENAL CODE ANN. §§ 2.03, 2.04; *Arnold v. State*, 742 S.W.2d 10 (Tex.Crim.App. 1987); *see also* TEX.CODE CRIM.PROC.ANN. art. 36.14; *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App. 1995)(the charge must contain an accurate statement of the law and must set out all essential elements of the offense).

If the trial court charges the jury on a defensive issue, but fails to do so correctly, this is charge error subject to review under *Almanza*. *See Vega v. State*, 394 S.W.3d 514, 519 (Tex.Crim.App. 2013), *citing Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985)(op. on reh'g). When analyzing a jury charge issue under *Almanza*, we utilize a two-pronged test and first determine whether there was error, and if so, we then determine whether the error caused sufficient harm to warrant a reversal. *See Torres v. State*, 543 S.W.3d 404, 414 (Tex.App.—El Paso 2018, pet. ref'd), *citing Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005); *Almanza*, 686 S.W.2d at 171; *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex.Crim.App. 2012).

The amount of harm necessary to warrant a reversal under *Almanza* depends on whether the defendant objected to the jury charge in the trial court. *Torres*, 543 S.W.3d at 414, *citing Ngo*, 175 S.W.3d at 743; *Almanza*, 686 S.W.2d at 171. When, as here, a defendant fails to object to the charge, the court will not reverse for jury-charge error unless the record shows "egregious harm" to the defendant. *See State v. Sanchez*, 393 S.W.3d 798, 803 (Tex.App.—El Paso 2012, pet. ref'd), *citing Ngo*, 175 S.W.3d at 743–44; *see also Torres*, 543 S.W.3d at 414, *citing Almanza*, 686 S.W.2d at 171. We base a determination of egregious harm on a finding of actual rather than theoretical harm. *Torres*, 543 S.W.3d at 414, *citing Cosio v. State*, 353 S.W.3d 766, 777 (Tex.Crim.App. 2011). To establish actual harm, the charge error must have affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. *Id., citing Cosio*, 353 S.W.3d at 777; *see also Taylor v. State*, 332 S.W.3d 483, 489 (Tex.Crim.App. 2011). In determining whether an appellant suffered actual harm, we review: (1) the entire charge; (2) the state of the evidence, including the contested issues and the weight of the probative evidence; (3) the arguments of counsel; and (4) any other relevant information revealed by the record. *Sanchez*, 393 S.W.3d at 803, *citing Ngo*, 175 S.W.3d at 750 n.48; *see also Vega*, 394 S.W.3d at 521.

First Almanza Factor: The Entire Jury Charge

Under the Texas self-defense statute, a person is justified in using deadly force if he reasonably believes such force is immediately necessary to protect himself from another person's use or attempted use of deadly force. *See* TEX.PENAL CODE ANN. § 9.32. Before 2007, the statute contained a provision imposing a general duty to retreat on a person claiming self-defense, providing that the person's use of deadly force could only be considered justified if "a reasonable

person in the actor's situation would not have retreated" before using the deadly force. *See Morales v. State*, 357 S.W.3d 1, 4-5 (Tex.Crim.App. 2011)(discussing prior version of the Penal Code). However, effective September 1, 2007, the Legislature amended the self-defense statute and deleted the language that gave rise to the defendant's general duty to retreat. *Id., citing* Acts 2007, 80th Leg., ch. 1, § 3, eff. Sept. 1, 2007. In addition, the 2007 amendments to the statute added two provisions, which expressly provide that a person has no duty to retreat before using deadly force under certain circumstances, or in other words, which allow a person to "stand his ground" while defending himself. *Morales*, 357 S.W.3d at 2. First, Section 9.32(c) of the Code provides that a "person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section." TEX.PENAL CODE ANN. § 9.32(c). Second, Section 9.32(d) of the Code provides that for "purposes of . . . determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat." TEX.PENAL CODE ANN. § 9.32(d).

Because of these changes to the Penal Code, the Texas Court of Criminal Appeals has recognized that it is now inappropriate for a trial court to instruct the jury that a defendant has a general duty to retreat. *See Morales,* 357 S.W.3d at 6. However, as the Court has also recognized, the "no duty to retreat" provisions in the Code are "not all-encompassing." *Id*. at 5. Instead, the provisions, "[b]y their language, they do not apply if the defendant provoked the person against whom force or deadly force was used or if the defendant was engaged in criminal activity at the time." *Id*. The Court has further noted that when these provisions do not apply,

the jury may consider the defendant's failure to retreat as one factor among many "in determining whether a defendant reasonably believed that his conduct was immediately necessary to defend himself or a third person." *Id*. at 5.

As the State acknowledges, the jury charge in the present case contained two application paragraphs that expressly, and erroneously, instructed the jury that Appellant had a general duty to retreat before he could justifiably use deadly force to protect himself from Hinojos's assault.[6] First, the trial court instructed the jury that:

> [I]f you find from the evidence beyond a reasonable doubt that on the occasion in question the [Appellant shot] Jorge Hinojos with a firearm as alleged, but you further find from the evidence that, viewed from the standpoint of the defendant that his life or person was in danger and there was created in his mind a reasonable expectation of fear of death or serious bodily injury from the use of unlawful deadly force at the hands of Jorge Hinojos or others, if any, and that acting under such apprehension, he reasonably believed that the use of deadly force on his part was immediately necessary to protect him against Jorge Hinojos or others', if any, use or attempted use of unlawful deadly force, and he shot the said Jorge Hinojos and *that a reasonable person in defendant's situation would not have retreated*, then you should acquit the defendant on the grounds of self-defense . . . . [Emphasis added].

Second, the trial court instructed the jury that:

> If you find from the evidence beyond a reasonable doubt (I) that at the time and place in question the defendant did not reasonably believe that he was in danger of death or serious bodily injury; (2) *that a reasonable person in defendant's situation, at such time and place, would have retreated before using deadly force against Jorge Hinojos*; or (3) that defendant, under the circumstances, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Jorge Hinojos or others, if any, use or attempted use of unlawful deadly force, if any, as viewed from defendant's standpoint, at the time, then you must find against the defendant on the issue of self-defense. [Emphasis added].

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[6] The application paragraph of a jury charge applies the relevant penal law, abstract definitions, and general legal principles to the facts of the case and the indictment allegations. *Bautista v. State*, No. 08-15-00362-CR, 2018 WL 4907821, at *6 (Tex.App.—El Paso Oct. 10, 2018, no pet.)(not designated for publication), *citing Vasquez v. State*, 389 S.W.3d 361, 366 (Tex.Crim.App. 2012). When the application paragraph of a jury charge incorrectly applies the relevant penal law to the facts of a given case, it is erroneous. *Id., citing Cortez v. State*, 469 S.W.3d 593, 598 (Tex.Crim.App. 2015).

Further, as the State also appears to acknowledge, there is nothing in the remainder of the charge that clarified the "retreat" issue for the jury. In other words, the charge did not instruct the jury on the "no duty to retreat" provisions in the self-defense statute, nor did it instruct the jury on the circumstances in which those provisions do not apply, i.e., when the defendant has provoked the use of force or when the defendant was engaged in criminal activity at the time he used deadly force. *Morales,* 357 S.W.3d at 5. Thus, the jury was never given the opportunity to determine if those circumstances fit Appellant's case. Moreover, the jury was not instructed that if the "no duty to retreat" provisions did not apply to Appellant's case, it could only consider Appellant's failure to retreat as one factor among many in determining whether Appellant's use of deadly force was justified. *Morales*, 357 S.W.3d at 5. Instead, the trial court instructed the jury, in no uncertain terms, that it could not find the shooting justified, and could not acquit Appellant of the charged offense, if it found that a reasonable person in Appellant's situation would have retreated before using deadly force to defend himself, which was a clear misstatement of the current law.

As such, viewing the jury charge as a whole, we conclude that the error in the charge undermined and vitally affected Appellant's sole defense, which was the only disputed issue at trial. We therefore conclude that this factor weighs heavily in favor of a finding of egregious harm. *See, e.g., Guzman v. State*, No. 03-13-00131-CR, 2015 WL 2400238, at *8–11 (Tex.App.—Austin May 13, 2015, pet. ref'd)(mem. op., not designated for publication)(where trial court erroneously instructed the jury that the defendant had a general duty to retreat in four places in the jury charge, and never clarified the law, this factor weighed in favor of a finding of harm); *see also Wall v. State*, No. 02-18-00065-CR, 2019 WL 2041839, at *5 (Tex.App.—Fort Worth May 9, 2019, no pet.)(mem. opn., not designated for publication)(where abstract portion of the

jury charge contained erroneous instructions with regard to defendant's duty to retreat, this factor weighed heavily in favor of defendant's claim of egregious harm, as it "undermined and vitally affected [the defendant's] sole defense, which was the only disputed issue at trial.").

Second Almanza Factor: The State of the Evidence

The State contends that the second *Almanza* factor weighs heavily against Appellant, arguing that the evidence supporting Appellant's self-defense claim was exceedingly "weak" and "implausible," making it "unlikely that Appellant was harmed as a result of the erroneous instructions." In particular, the State argues that there was little or no evidence to support a finding that Appellant had a reasonable belief that Hinojos was using or attempting to use deadly force against him at the time of the shooting, which would have justified Appellant's use of deadly force in response. *See* TEX.PENAL CODE ANN. § 9.32. In fact, the State argues that the evidence was so weak that Appellant was not even entitled to a jury instruction on the law of self-defense in the first instance. In turn, the State points out that if a defendant was not entitled to a defensive instruction in the first instance, he cannot be said to have been harmed by any error in the instruction. *See, e.g., Torres v. State*, No. 08-13-00027-CR, 2016 WL 5404773, at *3 (Tex.App.—El Paso Sept. 28, 2016, pet. ref'd)(not designated for publication)(recognizing the "long-standing rule that if a defendant is not entitled to an instruction, but the trial court nevertheless gives the instruction, any error in the instruction is harmless), *citing Hughes v. State*, 897 S.W.2d 285, 301 (Tex.Crim.App. 1994).

For the reasons set forth below, we conclude that the evidence was not only sufficient to warrant a self-defense instruction, but was sufficient to support Appellant's assertion that he was harmed by the error in the instruction.

The Law on Self-Defense and the Use of Deadly Force

In order to be entitled to an instruction on self-defense, a defendant charged with murder must admit to the underlying criminal act, and then raise a claim of self-defense as a justification for his conduct.[7] *See, e.g.*, *Gamino v. State*, 537 S.W.3d 507, 512 (Tex.Crim.App. 2017); *see also Hill v. State*, 99 S.W.3d 248, 250–51 (Tex.App.—Fort Worth 2003, pet. ref'd); *VanBrackle v. State*, 179 S.W.3d 708, 715 (Tex.App.—Austin 2005, no pet.). The Texas self-defense statute provides that a person is generally justified in using force against another when and to the degree that person reasonably believes the force is immediately necessary to protect himself against another person's "use or attempted use of unlawful force."[8] *See Gamino*, 537 S.W.3d at 510, *citing* TEX.PENAL CODE ANN. § 9.32(a)(1), (2)(A); *see also Alonzo v. State*, 353 S.W.3d 778, 782 (Tex.Crim.App. 2011). With regard to using deadly force, Section 9.32 of the Code provides that, "A person is justified in using deadly force against another: (1) if the actor would be justified in using force against the other under Section 9.31; and (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary: (A) to protect the actor against the other's use or attempted use of unlawful deadly force . . . ." TEX.PENAL CODE ANN. § 9.32(a); *see also Henley v. State*, 493 S.W.3d 77, 89 (Tex.Crim.App. 2016). In turn, Section 9.01 of the Code defines

[7] It is well-established, however, that a defendant need not testify in order to raise the issue of self-defense; instead, a claim of self-defense "may be raised by the testimony of witnesses who testify to the defendant's acts and words at the time of the offense." *See Reed v. State*, 703 S.W.2d 380, 384-85 (Tex.App.—Dallas 1986, pet. ref'd), *citing Smith v. State*, 676 S.W.2d 584, 585 (Tex.Crim.App. 1984); *see also Tovar v. State*, No. 08-06-00157-CR, 2008 WL 2133140, at *4 (Tex.App.—El Paso May 22, 2008, no pet.)(not designated for publication)(recognizing that it is not necessary that a defendant testify in order to raise the issue of self-defense, as "the defense may be raised by other testimony that demonstrates that the accused acted in self-defense.").

[8] The Code further provides that a person is not justified in using force: "(1) in response to verbal provocation alone . . . (3) if the actor consented to the exact force used or attempted by the other; (4) if the actor provoked the other's use or attempted use of unlawful force, unless: (A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and (B) the other nevertheless continues or attempts to use unlawful force against the actor." TEX.PENAL CODE ANN. § 9.31(b).

"deadly force" as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." *Alonzo*, 353 S.W.3d at 782-83, *citing* TEX.PENAL CODE ANN. § 9.01(3). Section 1.07 of the Code further defines a "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." TEX.PENAL CODE ANN. § 1.07(42). The Code, however, provides that in certain factual situations, to be discussed in more detail below, such as when the victim was entering or attempting to enter the defendant's occupied vehicle or home, the jury must presume that a defendant had a reasonable belief that it was immediately necessary to use deadly force to defend himself. *See* TEX.PENAL CODE ANN.§ 9.32(b).

As a preliminary matter, we agree with the State that, without the application of any of the statutory presumptions set forth in the self-defense statute, the evidence that Appellant had a reasonable belief that his use of deadly force was immediately necessary to protect himself from Hinojos's assault was relatively weak. As set forth above, Hinojos's assault on Appellant was two-fold; first, he threw a beer can into Appellant's vehicle, and second, he used a closed fist to punch Appellant as many as three times on Appellant's face or shoulders through the open window of Appellant's truck. In general, a person faced with an assault of this nature is entitled to defend himself against the attack using the amount of force he reasonably believed was necessary.[9] *See Gamino v. State*, 480 S.W.3d 80, 89 (Tex.App.—Fort Worth 2015), *aff'd*, 537 S.W.3d 507 (Tex.Crim.App. 2017)(discussing the right of an individual to act in self-defense in response to an assault), *citing* TEX.PENAL CODE ANN. § 9.31. However, as the State correctly points out, various courts, including this Court, have held that a defendant is not typically justified in using *deadly*

[9] We note that there are exceptions to this general rule, such as when the defendant has provoked the attack, is resisting arrest, or has consented to the attack. *See generally* TEX.PENAL CODE ANN.§ 9.31(b).

force against another individual when the individual has merely used his fists to punch or attempt to punch the defendant during an altercation. *See e.g., Dearborn v. State*, 420 S.W.3d 366, 378 (Tex.App.—Houston [14th Dist.] 2014, no pet.)(evidence did not support defendant's claim of self-defense where he shot victim who was "armed" only with his fists, noting that courts have "not treated blows with fists as deadly force."); *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex.App.—Fort Worth 2008, pet. ref'd)(a reasonable jury properly instructed on the issue of self-defense could not have found that the defendant was justified in using deadly force against his victim, where the defendant provoked the altercation, and where the victim struck another individual involved in the altercation with his fists); *Musial v. State*, No. 08-02-00029-CR, 2003 WL 197384, at *1–2 (Tex.App.—El Paso Jan. 30, 2003, pet. ref'd)(not designated for publication)(victim's single blow with an unidentified object did not constitute deadly force justifying defendant's use of deadly force in response).

We recognize, however, that there are exceptions to this general rule. As Justice Burgess pointed out in his dissenting opinion in *Jordan v. State*, there clearly could be situations in which a person has violently and forcefully used his fists or hands to assault a defendant, and has done so in a manner calculated to inflict serious bodily injury or death, which, turn, would allow a rational jury to infer that the defendant had a reasonable belief that it was immediately necessary to use deadly force to protect himself from the assault. *See Jordan v. State*, 558 S.W.3d 173, 186 (Tex.App.—Texarkana 2018, pet. granted)(opn. on reh'g)(Burgess, J. dissenting)(recognizing that in the context of self-defense claims, although a fist is not generally considered a "deadly weapon, per se, [it] may become so in the manner of its use."). As Justice Burgess also pointed out, the determination of whether an individual used his fists or hands in a manner calculated to inflict

serious bodily injury or death is dependent on the facts of a particular case, as "a heavyweight boxer's fists would be more likely to inflict serious bodily injury or death than those of a 100-pound asthmatic."[10] *Id.* at 186-187.

In the present case, we recognize that the evidence that Hinojos used his fists in a manner calculated to inflict serious bodily injury or death during his assault on Appellant was relatively weak, given the fact that Hinojos was of average height and size and was no doubt hindered by the fact that he was assaulting Appellant through his truck's window. However, the very fact that the assault took place through the truck's window requires us to consider the effect of the statutory presumption of reasonableness set forth in the self-defense statute, which, if applicable would require the jury to presume that Appellant's conduct in responding to Hinojos's assault was in fact justified.

The Effect of the Statutory Presumption of Reasonableness

Section 9.32(b) of the Code provides that: "The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:

> (1) knew or had reason to believe that the person against whom the deadly force was used:
>
> (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied . . .vehicle….

[10] We note that Justice Burgess's analysis is consistent with the well-accepted test for determining when a defendant's hands or fists can be considered a deadly weapon for such purposes as enhancing a defendant's conviction, which focuses on the question of whether the defendant used his hands or fists in a manner calculated to inflict serious bodily injury or death. *See e.g., Lane v. State,* 151 S.W.3d 188, 191 (Tex.Crim.App. 2004); *see also Turner v. State*, 664 S.W.2d 86, 89 (Tex.Crim.App. 1983)(jury could consider a defendant's body part to be a deadly weapon depending on the manner of its use in determining whether defendant committed aggravated assault); *Rios v. State*, No. 08-06-00211-CR, 2008 WL 4351133, at *7 (Tex.App.—El Paso Sept. 24, 2008, no pet.)(not designated for publication) (evidence was sufficient to support a finding that defendant used his hands in a manner calculated to inflict serious bodily injury, such as to support the jury's "deadly weapon finding.").

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's . . . vehicle . . . [and]

. . .

(2) [the actor] did not provoke the person against whom the force was used; and

(3) [the actor] was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

TEX.PENAL CODE ANN.§ 9.32(b).

In turn, Section 2.05 of the Penal Code provides that a presumption favoring the defendant must be submitted to the jury "if there is sufficient evidence of the facts that give rise to the presumption . . . unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact." *Morales v. State*, 357 S.W.3d 1, 7 (Tex.Crim.App. 2011), *citing* TEX.PENAL CODE ANN. § 2.05. Moreover, the Code provides that when a jury is instructed on a statutory presumption, the jury must also be instructed that "the presumption applies unless the State proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist," and that if the State fails in meeting this burden, "the jury must find that the presumed fact exists." *Braughton v. State*, 569 S.W.3d 592, 618 (Tex.Crim.App. 2018), *citing* TEX.PENAL CODE ANN.§ 2.05(b)(2)(A), (B). Similarly, the Code provides that the jury must be instructed that if it "has a reasonable doubt as to whether the presumed fact exists, the presumption applies and the jury must consider the presumed fact to exist." TEX.PENAL CODE ANN. § 2.05(b)(2)(D).

In the present case, the trial court instructed the jury in accordance with the statutory presumption set forth in Section 9.32(b) of the Code.[11] Therefore, the trial court impliedly found

[11]Although the trial court instructed the jury on the factual circumstances in which an actor's use of deadly force is

that there was sufficient evidence of the facts giving rise to the presumption to support the instruction, and conversely, that Appellant was not otherwise precluded from receiving the instruction.[12] Our review of the record supports the trial court's determination that there was sufficient evidence to support giving this instruction.

Evidence that Hinojos was Entering or Attempting to Enter Appellant's Vehicle

As set forth above, the first prong of the statutory presumption provides that the defendant must have reasonably believed that the victim was either entering or attempting to enter his occupied vehicle, and/or was removing or attempting to remove him from his vehicle, in an unlawful and forceful manner. TEX.PENAL CODE ANN.§ 9.32(b)(1)(A), (B). As a preliminary matter, we note that the record does not contain any evidence that Hinojos was unlawfully or forcefully removing or attempting to remove Appellant from his vehicle at the time of the shooting. We therefore limit our discussion to the question of whether the record contains sufficient evidence to support a finding that Hinojos was either entering or attempting to enter Appellant's vehicle at the time of the shooting—a question that will, in large part, depend on how the term, "enter," is defined.

Unfortunately, the self-defense statute itself does not provide a definition for the term "enter." When a term is not defined in a particular code provision, we may derive its meaning from its common usage, including dictionary definitions, and in addition, we may also borrow

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presumed to be reasonable, it failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that each of the facts giving rise to the presumed fact did not exist. Appellant, however, does not complain about this aspect of the jury charge on appeal.

[12] The State does not address the question of whether there was sufficient evidence to support the trial court's decision to give the statutory presumption instruction; instead, the State only discusses the applicability of the statutory presumption with respect to Appellant's sufficiency of the evidence argument, contending that there was conflicting evidence with regard to whether the facts supporting the statutory presumption existed.

from other code provisions in which the same term has been defined by the Legislature. *See generally Ex parte Evans*, 964 S.W.2d 643, 646 (Tex.Crim.App. 1998); *see also State v. Ross*, 573 S.W.3d 817, 821-823 (Tex.Crim.App. 2019)(deriving meaning of undefined term in criminal statute by looking to its common usage, such as common dictionary definitions, as well as by examining how the term is defined in other Texas criminal statutes).

Various dictionaries provide very broad and not particularly helpful definitions of the term, "enter," defining it as "to come or go into a place," or simply as, "to go or come in." *See, e.g.*, Dictionary.Cambridge.org, https://dictionary.cambridge.org/us/dictionary/english/enter; Merriam-Webster.com, https://www.merriam-webster.com/dictionary/enter. We therefore find it appropriate to instead look to the definition of the term "enter" as the Legislature has defined it in other sections of the Penal Code, and in particular, in the Code section defining the offense of burglary, which provides that a "person commits an offense if, without the effective consent of the owner, the person . . . enters a habitation, or a building . . . not then open to the public, with intent to commit a felony, theft, or an assault." TEX.PENAL CODE ANN.§ 30.02(a)(1). In that section, the Legislature defined the term "enter," as meaning to "intrude . . . any part of the body; or . . . any physical object connected to the body." TEX.PENAL CODE ANN. § 30.02(b); *see also Moore v. State,* 54 S.W.3d 529, 539–40 (Tex.App.—Fort Worth 2001, pet. ref'd)(testimony that defendant "entered" victim's house by placing his foot in the door held factually sufficient to support conviction for burglary of a habitation); *Martinez v. State*, 304 S.W.3d 642, 660 (Tex.App.—Amarillo 2010, pet. ref'd)(evidence "that some part of the burglar's body, presumably either a shoulder or foot" breached the plane of the victim's residence was sufficient to establish the element of "entry" as used in the burglary statute); *see generally Morgan v. State*, 501 S.W.3d 84,

90 (Tex.Crim.App. 2016)("A person charged with burglary under Section 30.02(a)(1) is guilty of that offense the moment that he crosses the threshold of a habitation without consent and with the intent to commit the underlying felony.").

Applying this definition, we find ample evidence in the record to support a finding that Hinojos was either entering or attempting to enter Appellant's vehicle at the time of the shooting. As described above, Hinojos initially threw a beer can through the passenger side window of the vehicle, walked around to the driver side of the vehicle, and while clearly angry and upset with Appellant, reached his arm through the open driver's side window of the vehicle and began assaulting him. Although none of the witnesses observed Hinojos attempt to open the vehicle's door, the evidence clearly established that Hinojos placed his arm through the open window of the vehicle during the assault, and the jury could have reasonably inferred that if Appellant had not stopped him, Hinojos may have continued to escalate his assault on Appellant by thrusting his body farther into the vehicle. Accordingly, we conclude that there was sufficient evidence from which the jury could have determined that Hinojos was either entering, or attempting to enter, Appellant's vehicle in an unlawful and forceful manner at the time of the shooting.

Evidence of Provocation

As set forth above, the second prong of the statutory presumption provides that the defendant must not have provoked the force that he used against his victim. TEX.PENAL CODE ANN. § 9.32(b)(2). In order to find that a defendant provoked the use of deadly force against his victim, it must be shown that the defendant engaged in some conduct for the "purpose and with the intent that the defendant would have a pretext for killing the victim." *See Smith v. State,* 965 S.W.2d 509, 518 (Tex.Crim.App. 1998). Further, although the defendant's intent to provoke the

use of deadly force may be inferred from circumstantial evidence, there nevertheless must be some evidence that the defendant's actions or words were "reasonably calculated to provoke the attack." *Id.* at 517*; see generally Torres v. State,* 543 S.W.3d 404, 416 (Tex.App.—El Paso 2018, pet. ref'd).

At trial, the prosecutor argued that Appellant provoked the confrontation with Hinojos by stopping his vehicle in the parking lot, rolling his window down, and thereafter staring at Hinojos and his friends in an "ugly" manner, by refusing to respond to the statements made to him by the group, and by failing to drive away. And on appeal, the State contends that this same evidence, including Appellant's act of staring at the group "in an ugly and/or intimidating manner," was evidence of "possible provocation." Whatever value this evidence may have, it clearly falls short of conclusively establishing that Appellant provoked the confrontation with the intent to use deadly force against Hinojos. There is nothing in the record to establish that Appellant had any pre-existing motive or plan to kill Hinojos that evening, and in fact, the evidence established that Appellant did not know Hinojos prior to the confrontation. Further, all of the witnesses testified that after Appellant stopped his car, he no longer posed a danger to anyone in the parking lot, and he made no verbal or other threats to anyone in Hinojos's group that would have provoked Hinojos's assault on him. Accordingly, we conclude that a rational jury could have found that Appellant did not provoke the confrontation that led to his use of deadly force.

Evidence that Appellant was Otherwise Engaged in Criminal Activity

The third prong of the statutory presumption provides that the defendant must not have been "otherwise engaged in criminal activity" at the time that he used deadly force. TEX.PENAL CODE ANN. § 9.32(b). Although the term "otherwise engaged in criminal activity" is not defined in the Penal Code, we agree with our sister courts that the term should be "broadly construed to

comport with the generally understood concept that it would encompass any activity that constitutes a crime" under state or federal statutes. *Barrios,* 389 S.W.3d at 393; *see also Johnson v. State*, No. 01-15-00101-CR, 2016 WL 4536954, at *13 (Tex.App.—Houston [1st Dist.] Aug. 30, 2016, pet. ref'd)(mem. opn., not designated for publication)(noting that "criminal activity" "can be broadly construed" to "encompass any activity that constitutes a crime.").

Thus, where there is dispositive and undisputed evidence that a defendant was engaged in the commission of a separate offense at the time he used deadly force, this would preclude him from receiving an instruction on any of the statutory presumptions set forth in the self-defense statute. *See, e.g., Villarreal v. State*, 453 S.W.3d 429, 440 (Tex.Crim.App. 2015)(where defendant admitted that he initiated a confrontation with his victim by making multiple verbal threats, which clearly established that he was committing the offense of assault by threat at the time that he used deadly force, defendant was precluded from receiving an instruction on the statutory presumption of reasonableness); *see also Larrinaga v. State*, No. 02-14-00199-CR, 2015 WL 4730710, at *3 (Tex.App.—Fort Worth Aug. 6, 2015, pet. ref'd)(not designated for publication)(defendant was not entitled to statutory presumption instruction where the evidence established that he was committing the third-degree felony offense of possession of a firearm by a convicted felon at the time of his encounter with the victim); *Barrios*, 389 S.W.3d at 394 (where the undisputed evidence established that defendant was in violation of federal law for being an illegal immigrant in possession of a firearm at the time that he used deadly force against his victim, defendant was not entitled to an instruction on the statutory presumption).

In the present case, the prosecutor argued at trial that Appellant was committing the offense of operating a vehicle while intoxicated, i.e., that he was violating the Texas DWI statute, at the

time of the shooting, which precluded the jury from applying the statutory presumption to Appellant's case. Additionally, on appeal, the State suggests that the record contains evidence that Appellant "may have been committing multiple crimes," including the offense of DWI, as well as the offense of "assault by threat," based on Torres's testimony that Appellant pointed a gun at him prior to the shooting. Although there is evidence in the record that Appellant may have been engaged in the commission of either of those two offenses at the time of the shooting, the evidence was certainly not dispositive, and therefore, a rational jury could have rejected the State's argument that Appellant's conduct rendered the statutory presumption applicable to his case.

First, we do not believe that there was dispositive evidence establishing that Appellant was in violation of the Texas DWI statute by driving while intoxicated at the time of the shooting. The Texas DWI statute provides that intoxication may be proven in either of two ways: (1) by presenting evidence of the defendant's loss of the normal use of his mental or physical faculties, also known as the "impairment theory;" or (2) by presenting evidence that the alcohol concentration in the defendant's blood, breath, or urine was at a level of 0.08 or more, also known as the "per se theory." *Kirsch v. State*, 306 S.W.3d 738, 743 (Tex.Crim.App. 2010), *citing* TEX.PENAL CODE ANN. § 49.01(2). The State, however, presented no evidence of the alcohol concentration in Appellant's blood, breath, or urine in order to satisfy the "per se" theory of intoxication. In addition, although the State did present evidence that Appellant had been drinking at the billiard hall prior to driving his vehicle in the parking lot, there was no evidence establishing the amount of alcohol that Appellant consumed that evening, no evidence of when Appellant stopped drinking before he left the venue, and no evidence of how the alcohol would

have been metabolized in Appellant's body. Although Torres, who spoke to Appellant through his vehicle's window, described Appellant as appearing to be "drunk," neither Torres nor any other witnesses provided any testimony regarding how Appellant's alleged intoxication affected his driving in order to satisfy the impairment theory of intoxication. *See generally Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex.Crim.App. 2010)(although circumstantial evidence is sufficient to support a conviction for driving while intoxicated, there must be a "temporal link between the a [sic] defendant's intoxication and his driving" to support the conviction). Therefore, at best, the evidence raised a factual question regarding whether Appellant was committing a DWI at the time of the shooting.

Similarly, we do not believe that there was dispositive evidence that Appellant was committing the offense of "assault by threat" at the time of the shooting. Section 22.01 of the Penal Code provides that a person commits the offense of "assault by threat" when he "intentionally or knowingly threatens another with imminent bodily injury." TEX.PENAL CODE ANN. § 22.01(a). Although it is generally accepted that the display of a weapon can be considered threatening in nature, there must nevertheless be evidence that the threat was intended to place the victim in fear of imminent harm. *See Moore v. State*, 143 S.W.3d 305, 316 (Tex.App.—Waco 2004, pet. ref'd), *citing Helleson v. State,* 5 S.W.3d 393, 396 (Tex.App.—Fort Worth 1999, pet. ref'd); *see also* TEX.PENAL CODE ANN. §§ 22.01(a)(2), 22.07(a)(2). In determining whether there was sufficient evidence of the defendant's intent to place his victim in fear, the jury may consider whether the defendant actually produced fear in the victim, as well as whether the defendant "acted in such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility." *See Olivas v. State*, 203 S.W.3d 341, 347 (Tex.Crim.App.

2006); *see also* S*osa v. State*, 177 S.W.3d 227, 231 (Tex.App.—Houston [1st Dist.] 2005, no pet.) (evidence was sufficient to support defendant's conviction of assault by threat where defendant displayed a weapon and demanded money from his victim).

In the present case, Torres expressly testified that when Appellant pointed the gun at him, he did not feel "scared," because he did not believe that Appellant "was going to shoot [the gun]." In addition, Torres testified that Appellant did not make any verbal threats to him at any time during their encounter. Therefore, a rational jury could have concluded that Appellant did not in fact intend to place Torres in fear of imminent harm. Moreover, the jury could have simply chosen to disbelieve Torres's testimony that Appellant pointed the gun at him, as no other witnesses observed Appellant point the gun at Torres, and Appellant did not admit to doing so. [13] *See generally Brooks v. State*, 323 S.W.3d 893, 899 (Tex.Crim.App. 2010)(recognizing that the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony). We therefore conclude that a rational jury could have determined that Appellant was not "otherwise engaged in criminal activity" at the time of the shooting.

Accordingly, because we find that there was sufficient evidence to support a finding of the existence of all necessary facts giving rise to the statutory presumption of reasonableness, as set forth in the self-defense statute, we conclude that the jury could have found the presumption applicable to Appellant's case, and therefore could have found that Appellant's use of deadly force against Hinojos was justified.

[13] We also note that Torres's credibility was impeached during the trial on other factual issues. For example, Torres testified at trial that Appellant shot at him three times as he drove out of the parking lot after shooting Hinojos, but police found no evidence that Appellant had fired these additional shots. Moreover, Torres failed to inform police that Appellant tried to shoot him when he gave his police statement, and apparently made this allegation for the first time at trial.

The Plausibility of the Evidence

We recognize, however, that merely because there was sufficient evidence to support Appellant's claim of self-defense, this does not necessarily mean that there was sufficient evidence to conclude that egregious harm occurred under the standards set forth in *Almanza*. *See Villarreal*, 453 S.W.3d at 436 (noting that "mere existence of conflicting testimony surrounding a contested issue does not necessarily trigger a finding of egregious harm"). In other words, when conducting an *Almanza* analysis, our inquiry is not limited to whether there was some evidence in the record to support the defendant's position, and we may instead consider the plausibility of that evidence and the likelihood that the jury would have found in the defendant's favor if correctly instructed on the law. *See, e.g.*, *Allen v. State*, 253 S.W.3d 260, 267-68 (Tex.Crim.App. 2008); *see also Villarreal*, 453 S.W.3d at 436 (noting that the court may consider the relative weakness of the evidence in determining the plausibility of the evidence when considering the second prong of an egregious-harm analysis).

As set forth above, without the application of the statutory presumption of reasonableness, Appellant's claim that he was justified in using deadly force against Hinojos's assault was relatively weak. However, the record contains plausible, albeit conflicting, evidence that Appellant was entitled to the statutory presumption of reasonableness, given the undisputed evidence that Hinojos was assaulting Appellant through the open window of his truck, which gave rise to an inference that Appellant was entering or attempting to enter his occupied vehicle at the time of the shooting. Moreover, we find it significant that the jury sent a question to the trial court asking for the "legal definition of entering a vehicle," which clearly indicated that the jury was

considering the possibility of applying this statutory presumption to Appellant's case.[14] Given these circumstances, we find it possible, if not likely, that the jury may have found it appropriate to apply the statutory presumption to Appellant's case, which would have required it to find that Appellant's use of deadly force was justified. In turn, it is also possible that the jury may have nevertheless rejected Appellant's claim of self-defense due to the error in the jury charge instructing it that Appellant had a general duty to retreat before he could justifiably use deadly force to protect himself against Hinojos's assault.

Accordingly, given the fact that the charge error on the "retreat" issue affected the central and only contested, issue in Appellant's case, we find this factor weighs in favor of Appellant, albeit only slightly, in light of the conflicting nature of the evidence presented at his trial. *See generally Wall*, 2019 WL 2041839, at *6, *citing Salinas v. State*, No. 13-15-00310-CR, 2016 WL 2747770, at *6 (Tex.App.—Corpus Christi May 5, 2016, no pet.)(mem. opn., not designated for publication)(finding that the "state of the evidence" factor weighed slightly in favor of a finding of egregious harm, where the charge error affected "the central issue in the case"); *see also Burd v. State*, 404 S.W.3d 64, 73 (Tex.App.—Houston [1st Dist.] 2013, no pet.)(concluding that the state of evidence weighed in favor of an egregious harm finding where the only contested issue at trial was whether defendant acted in self-defense and where the evidence relating to it was "hotly disputed.").

Third and Fourth *Almanza* Factors: Arguments Made to the Jury and Other Relevant Information

[14] In response to the jury's question, the trial court provided the jury with the definition found in the burglary statute, as set forth above, stating that the term "'enter' means to intrude . . . [a]ny part of the body; or . . . [a]ny physical object connected with the body."

As set forth above, the third *Almanza* factor focuses on the arguments and comments the attorneys made to the jury, and whether those arguments and comments helped cure the error in the jury charge by correctly explaining the law to the jury, while the fourth factor focuses on any other relevant information found in the record. *See generally Sanchez,* 393 S.W. 3d at 803. We consider these two factors together.

The State contends that any error in the jury charge was mitigated when the prosecutor explained the "stand your ground" law to the jury during voir dire, and when she "correctly informed the jury that there was no duty or requirement to retreat when an actor claimed self-defense as a justification." We agree with the State that in general, when a prosecutor correctly explains the law on a particular topic to the jury during voir dire, this can be a mitigating factor in determining whether a defendant was harmed by a jury charge that incorrectly stated the law on that same topic. *See Johnson v. State,* No. 01-15-00101-CR, 2016 WL 4536954, at *12 (Tex.App.—Houston [1st Dist.] Aug. 30, 2016, pet. ref'd)(mem. opn., not designated for publication)(prosecutor's proper explanation of the law on self-defense during voir dire was a factor in holding that appellant was not egregiously harmed by errors in the self-defense instructions given to the jury), *citing Gonzalez v. State,* No. No. 08-11-00147-CR, 2012 WL 4101900, at *4 (Tex.App.—El Paso Sept. 19, 2012, pet. ref'd)(not designated for publication)(statements made by counsel during voir dire regarding the law on self-defense were relevant to egregious harm analysis). However, a closer examination of the prosecutor's comments during voir dire reveal that her explanation of the law on self-defense was, at best, less than clear, and at worst, inaccurate.

While the prosecutor did discuss the "stand your ground" law during voir dire, and initially explained that in Texas, a person is not required to retreat or flee before using deadly force, the prosecutor thereafter made a series of comments that suggested otherwise. In particular, the prosecutor repeatedly stated that although a person who is defending himself has the choice of either staying or fleeing, his decision to stay—rather than retreat-- must have been "reasonable," and that "it must have been immediately necessary for [him] to stay" if the defendant decides to do so. These comments were misleading, as the prosecutor did not explain to the jury that it could only consider the reasonableness of a defendant's failure to retreat if it found that the "stand your ground" provisions in the self-defense statute were inapplicable to Appellant's case, i.e., if it found that Appellant was not in a location where he had the right to be, if Appellant provoked the use of force, and/or if Appellant was engaged in criminal activity at the time of the shooting. TEX.PENAL CODE ANN. § 9.32(c); *Morales*, 357 S.W.3d at 5. Thus, the prosecutor's comments did nothing to clarify the law on self-defense, and instead, her comments in effect mirrored the error in the jury charge, making it appear that Appellant had a general duty to retreat if he could do so reasonably, thereby compounding the harm that was caused by the trial court's erroneous instruction.

Moreover, during the course of the trial, the prosecutor repeatedly asked witnesses if they believed Appellant could have driven his car away "if he had wanted to" after he was confronted by Hinojos and his friends in the parking lot, to which all of the witnesses replied in the affirmative. Similarly, the prosecutor asked the jurors during her closing argument if they believed it was "reasonable" for Appellant to decide to stay, and expressed her opinion that a reasonable person in Appellant's situation "would have retreated before using deadly force." As well, during both her opening statements and closing arguments, the prosecutor repeatedly argued that Appellant

could have easily driven away from the scene of the confrontation "at any moment," but that he made the decision to stay behind, which in effect escalated the confrontation. In addition, the prosecutor closed her argument by saying that Appellant "had many options," including the option of just driving away, and that "[a] reasonable person like you and me . . . would have tried to flee at all costs rather than kill, rather than take a human life." And finally, and perhaps most damaging of all, during closing arguments, the prosecutor expressly referred to the erroneous jury instructions, and stated that, based on the jury charge, Appellant's claim of self-defense was not valid if a "reasonable person" under the circumstances presented would have retreated before using deadly force. Again, the prosecutor made all of these arguments without explaining to the jury that it could only consider Appellant's failure to retreat as a factor in resolving his claim of self-defense if it determined that the "stand your ground" provisions in the self-defense statute did not apply to his case.

We recognize, of course, that the prosecutor could have argued that the "stand your ground" provisions in the self-defense statute did not apply to Appellant's case, and she could have then argued that Appellant's failure to retreat was unreasonable and that it could be considered as a factor relevant to the issue of whether he acted reasonably in using deadly force in response to Hinojos's assault.[15] *See Morales*, 357 S.W.3d at 5. However, the prosecutor skipped this step, and her arguments instead suggested to the jury that, regardless of the applicability of the "stand

[15] In a rather cursory manner, the State contends on appeal that there was no conflicting evidence on the issue of whether the "stand your ground" provisions applied to Appellant's case, arguing that the evidence clearly established that Appellant provoked the confrontation with Hinojos, and that Appellant was otherwise engaged in criminal activity at the time of the shooting. The State therefore suggests that the prosecutor was entitled to argue that Appellant's failure to retreat was unreasonable and that the jury could consider Appellant's failure to retreat as a factor in resolving his claim of self-defense. As explained above, however, and as the State appears to concede at other points in its brief, there was conflicting evidence on both of those issues and it was therefore up to the jury to determine who provoked the confrontation and whether Appellant was in fact engaging in criminal activity at the time of the shooting. *See generally Morales*, 357 S.W.3d at 5.

your ground" provisions, Appellant had a general duty to retreat before using deadly force, which effectively magnified the error in the jury charge. We therefore conclude that this factor weighs heavily in Appellant's favor.

Having found that all four *Almanza* factors weigh in Appellant's favor, we find that Appellant suffered egregious harm as the result of the error in the jury charge.

Appellant's Issue Two is sustained.

II. SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant contends that the evidence was legally insufficient to support his conviction, as the State failed to prove beyond a reasonable doubt that he did not act in self-defense. We disagree.

Standard of Review

When a defendant raises a claim of self-defense that would justify his use of force against another, the "defendant bears the burden to produce evidence supporting the defense, while the State bears the burden of persuasion to disprove the raised issues." *Braughton*, 569 S.W.3d at 608, *citing Zuliani v. State*, 97 S.W.3d 589, 594 (Tex.Crim.App. 2003); *Saxton v. State*, 804 S.W.2d 910, 913-14 (Tex.Crim.App. 1991). The defendant's burden of production requires him to produce some evidence that would support a rational finding in his favor on the issues raised by his self-defense claim. *Id., citing Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex.Crim.App. 2013). The burden then shifts to the State to prove its case beyond a reasonable doubt, i.e., to prove beyond a reasonable doubt that the defendant committed the offense as alleged in the indictment, and that the defendant did not act in self-defense in doing so. *Id., citing Zuliani*, 97 S.W.3d at 594; *see also Saxton,* 804 S.W.3d at 913-914.

When, as here, a jury renders a guilty verdict in a case in which a defendant has raised a claim of self-defense, it is an implied rejection of the defendant's claim. *Braughton*, 569 S.W.3d at 609, *citing Saxton*, 804 S.W.2d at 914. We review the legal sufficiency of the evidence to support a jury's rejection of a self-defense claim under the *Jackson v. Virginia* standard. *Braughton*, 569 S.W.3d at 608-09, *citing Jackson v. Virginia*, 443 U.S. 307 (1979); *see also Smith v. State*, 355 S.W.3d 138, 144 (Tex.App.—Houston [1st Dist.] 2011, pet. ref'd)(applying *Jackson v. Virginia* standard to jury's rejection of self-defense claim). Under that standard, we review the evidence in the light most favorable to the verdict to determine whether "any rational trier of fact would have found the essential elements of [the offense] beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Braughton*, 569 S.W.3d at 609, *citing Saxton*, 804 S.W.2d at 914. In conducting our review, we recognize the trier of fact's role as the sole judge of the weight and credibility of the evidence, and the jury's right to draw "reasonable inferences from the evidence." *Id.* at 608, *quoting Adames v. State*, 353 S.W.3d 854, 860 (Tex.Crim.App. 2011); *see also Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007). When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that resolution. *Braughton*, 569 S.W.3d at 608; *see also Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). In other words, we do not reevaluate the weight and credibility of the evidence in the record or substitute our own judgment for that of the fact finder, as we do not sit as a "thirteenth juror." *Braughton*, 569 S.W.3d at 608, *citing Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007); *Brooks*, 323 S.W.3d at 899. In conducting our review, we also keep in mind that circumstantial evidence is just as probative as direct evidence in establishing guilt, and that circumstantial evidence alone

may be sufficient to sustain a conviction. *Dobbs*, 434 S.W.3d at 170; *Carrizales v. State*, 414 S.W.3d 737, 742 n.20 (Tex.Crim.App. 2013).

The Hypothetically Correct Jury Charge

We measure the sufficiency of the evidence to support a conviction under a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997); *see also Villarreal v. State*, 286 S.W.3d 321, 327 (Tex.Crim.App. 2009). A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theory of liability, and adequately describes the offense for which the defendant was tried. *Malik*, 953 S.W.2d at 240; *see also Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex.Crim.App. 2018); *Quezada v. State*, 553 S.W.3d 537, 548 (Tex.App.—El Paso 2018, no pet.). In addition to setting forth the elements of the offense for which Appellant was charged, a hypothetically correct jury charge in this case would have properly instructed the jury on the law of self-defense. *See, e.g.*, *Raza v. State*, No. 05-17-00066-CR, 2018 WL 1062451, at *4 (Tex.App.—Dallas Feb. 27, 2018, no pet.)(mem. opn., not designated for publication)(recognizing that a hypothetically correct jury charge includes the defensive issues applicable to a defendant's case); *see also Leon-Gomez v. State*, No. 06-18-00144-CR, 2019 WL 1142678, at *3 (Tex.App.—Texarkana Mar. 13, 2019, no pet.)(mem. opn., not designated for publication)(a hypothetically correct jury charge would include an instruction on self-defense). As we have already extensively discussed the law on self-defense, we need not repeat it here; suffice it to say that a hypothetically correct jury instruction would have instructed the jury on the circumstances in which a defendant is justified in using deadly force, the circumstances in which a defendant is entitled to the statutory presumptions set forth in the self-

defense statute, and the circumstances in which a defendant is entitled to "stand his ground," as set forth in the statute. TEX.PENAL CODE ANN. § 9.32.

Analysis

Appellant contends that, under a hypothetically correct jury charge, the evidence was legally insufficient to support the jury's rejection of his self-defense claim. In particular, Appellant argues that the undisputed evidence established that Hinojos provoked the use of his deadly force by first throwing the beer can through his vehicle window, and by later assaulting him through his vehicle's window, and that he had a reasonable belief that it was immediately necessary to respond to Hinojos's assault with deadly force. In addition, Appellant argues that the undisputed evidence established that he was entitled to the statutory presumption that his belief was reasonable because he was in his vehicle "throughout the whole incident" and because he "reasonably assumed" that Hinojos was attempting to unlawfully and with force enter his occupied vehicle. Appellant contends that under these circumstances, no rational jury could have found that his use of deadly force was unreasonable and/or not otherwise justified.

As the State points out, however, and as we have explained above, the evidence was conflicting on virtually every aspect of Appellant's claim of self-defense, and the jury could have rejected Appellant's self-defense claim on any number of grounds. For example, the jury could have determined that Appellant did not have a reasonable belief that Hinojos was using or was attempting to use deadly force against him during the assault, or that it was immediately necessary to use deadly force to defend himself against the assault. *See, e.g.*, *Bundy v. State*, 280 S.W.3d 425, 435 (Tex.App.—Fort Worth 2009, pet. ref'd)(finding evidence was sufficient to support the jury's rejection of defendant's self-defense claim, where the evidence demonstrated that the victim

attempted to punch the defendant, who then stabbed the victim with a knife). In addition, the jury could have concluded that Appellant was not entitled to the statutory presumption that his use of deadly force was reasonable, as it was up to the jury to determine whether Hinojos was in fact entering or attempting to enter Appellant's vehicle at the time of the shooting, whether Appellant provoked the confrontation with Hinojos, and/or whether it believed that Appellant was otherwise engaging in criminal activity at the time of the shooting. *See generally Braughton*, 569 S.W.3d at 610 (where conflicting evidence was presented at trial, it was up to the jury to determine whether the statutory presumptions set forth in the self-defense statute applied in the defendant's case); *see also Villarreal*, 453 S.W.3d at 435 (recognizing that a jury is free to disregard the statutory presumption of reasonableness if it determines, based on the evidence, that the facts giving rise to the presumption do not exist).

Accordingly, based on our review of the evidence presented at trial, viewed in the light most favorable to the verdict, we conclude that a rational jury could have rejected Appellant's claim that he acted in self-defense when he shot Hinojos, and could have therefore found Appellant guilty of Hinojos's murder as charged in the indictment.

Appellant's Issue One is overruled.

CONCLUSION

Although we find sufficient evidence in the record to support Appellant's conviction, in light of the egregious error in the jury charge, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with our opinion.

October 31, 2019

ANN CRAWFORD McCLURE, Senior Judge

Before Rodriguez, J., Palafox, J., and McClure, Senior Judge
McClure, Senior Judge (Sitting by Assignment)

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